

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

<b>In the Matter of</b>	)	
	)	
<b>Informal Request For Certification</b>	)	<b>RM-10687</b>
<b>of the Industrial Telecommunications</b>	)	
<b>Association, Inc.</b>	)	

**To: The Commission**

**OPPOSITION OF WESTAR ENERGY, INC.**

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Dated: April 25, 2003

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**OPPOSITION OF WESTAR ENERGY, INC.**

Westar Energy, Inc. (“Westar”), by and through its undersigned counsel and pursuant to FCC Rule Section 1.405, hereby files this Opposition in the above-referenced proceeding.<sup>1</sup> In this proceeding, the Federal Communications Commission (“FCC” or “Commission”) issued a *Public Notice* requesting comments on the Informal Request for Certification of the Industrial Telecommunications Association, Inc. (“ITA”) filed January 27, 2003.<sup>2</sup> The Commission is treating ITA’s Informal Request as a petition for rulemaking, which is appropriate given that the requested relief would require modification of the Commission’s Rules.

ITA seeks certification as a frequency coordinator of the Industrial/Business Pool (“I/B”) frequencies below 512 MHz that were previously allocated exclusively to the Power, Railroad, and Automobile Emergency Radio Services (they were opened to all I/B eligibles in the Private Land Mobile Radio Service Refarming Rulemaking). ITA’s request

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<sup>1</sup> Consumer and Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed: Informal Request For Certification of the Industrial Telecommunications Association, RM-10687, *Public Notice* (Mar. 26, 2003).

is somewhat puzzling, however, because pursuant to FCC Rule Section 90.35(b)(2), it is already permitted to coordinate any I/B eligible on those frequencies so long as it obtains concurrence from the FCC-designated primary coordinator for each type of frequency.<sup>3</sup>

Moreover, ITA fails to present any persuasive arguments for modifying Section 90.35(b)(2), which was just finalized in December 2000 as part of the Refarming Rulemaking.<sup>4</sup>

## **I. STATEMENT OF INTERST**

Westar Energy, Inc. operates extensive private land mobile radio systems in connection with its provision of electricity to approximately 640,000 customers in Kansas. Its radio systems operate in the 72-76 MHz and 450-470 MHz bands, including the frequencies that were previously allocated exclusively to the Power Radio Service.<sup>5</sup> Westar's radio systems are an essential element of its electricity generation facilities and transmission and distribution networks. As such, it is committed to protecting its systems from interference, including interference that results from deficient, imprudent, or overly aggressive frequency coordination. Westar considers the United Telecom Council ("UTC"), the FCC-designated primary coordinator for the channels previously exclusive to

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<sup>2</sup> Informal Request for Certification of the Industrial Telecommunications Association, Inc., RM-10687 (filed Jan. 27, 2003).

<sup>3</sup> 47 C.F.R. § 90.35(b)(2) (2002). The primary coordinators for the former Power, Railroad, and Automobile Emergency Radio Service frequencies are the United Telecom Council, the Association of American Railroads, and the American Automobile Association, respectively.

<sup>4</sup> See, e.g., In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Fifth Memorandum Opinion and Order*, 16 FCC Rcd. 416, 418-19 (2000) ("*Fifth Memorandum Opinion and Order*").

<sup>5</sup> Westar is licensed for two former Power Radio Service frequencies in the 450 MHz band.

the Power Radio Service, to be an experienced and trusted resource for coordinating the previously exclusive channels or reviewing the work of other frequency coordinators before issuing a concurrence.

Westar and other power utilities have a significant interest in protecting the integrity of the former Power Radio Service frequencies, as those frequencies are still heavily used by utilities. Utilities have a tremendous responsibility to provide power to homes, businesses, industrial operations, and government institutions, as well as critical facilities such as hospitals and public safety entities. Behind that responsibility is the enormous task of maintaining the electricity generation, transmission, and distribution infrastructure. To do that, utilities rely on their radio systems for numerous purposes, including ensuring the safety of crews working on power lines. Given that a single misstep can be fatal to crew members and deprive entire areas of power, utilities need to have reliable, interference-free communications.

## **II. RULE SECTION 90.35(b)(2) SHOULD NOT BE MODIFIED**

ITA fails to provide any persuasive reasons for modifying Rule Section 90.35(b)(2) to allow it to coordinate the formerly exclusive Power, Railroad, and Automobile Emergency Radio Service frequencies without having to obtain concurrence from the appropriate primary coordinators. Rather, ITA simply details its belief that it is capable of coordinating those frequencies and presses the advantages of competition.

The problem with ITA's arguments is that Section 90.35(b)(2) is not directly concerned with whether a particular entity is merely competent to coordinate users on those frequencies. Section 90.35(b)(2) is also not directly concerned with competition. Instead, the Commission promulgated Section 90.35(b)(2) to ensure that the coordinator

with the most experience and the most knowledge of the highly sensitive operations with which those channels are associated maintains a proper degree of oversight in order to prevent interference.<sup>6</sup> The policy, purpose, and language of Section 90.35(b)(2) was shaped in the Refarming Rulemaking, in which the current issues were exhaustively aired and reviewed.<sup>7</sup>

The Commission observed that radio users in the Power, Railroad, and Petroleum Radio Services employ their systems, in part, “to respond to emergencies that could be extremely dangerous to the general public.”<sup>8</sup> The Commission found that “maintaining the integrity of spectrum used for such public safety purposes is extremely important and using coordinators who are knowledgeable with such special communications needs is the best way to protect these systems.”<sup>9</sup> The Commission reasoned that the existing coordinators for the Power, Railroad, and Petroleum Radio Services had the most experience with and knowledge of them. As such, Section 90.35(b)(2) was originally drafted to provide that only the existing coordinators for those services would be permitted to coordinate the services’ previously exclusive frequencies.<sup>10</sup> Section 90.35(b)(2) was later relaxed in the course of the Refarming Rulemaking to permit other coordinators, including ITA, to

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<sup>6</sup> For example, UTC has oversight over the former Power Radio Service channels, which are associated with power utilities. In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Second Report and Order*, 12 FCC Rcd. 14307, 14329-30 (1997); *Second Memorandum Opinion and Order*, 14 FCC Rcd. 8642, 8646-48 (1999); *Fifth Memorandum Opinion and Order*, 16 FCC Rcd. 416, 418-19 (2000).

<sup>7</sup> The Refarming Rulemaking spanned approximately eight years and resulted in the filing of over 2,500 comments, reply comments, petitions, and other submissions.

<sup>8</sup> *Second Report and Order* at 14329-30.

<sup>9</sup> *Second Report and Order* at 14329-30.

<sup>10</sup> Section 90.35(b)(2) was later amended to add the Automobile Emergency Radio Service.

coordinate the frequencies so long as they obtained concurrence from the primary coordinators.

Although ITA had several opportunities to petition for reconsideration of Section 90.35(b)(2) as it evolved over several years, it never did so. Rather, it filed a pleading *expressly supporting* the rule.<sup>11</sup> Now, however, two and one-half years after Section 90.35(b)(2) was finalized and implemented, ITA contends that it should be changed to permit non-primary coordinators to coordinate the previously exclusive frequencies without obtaining concurrence. Such a modification would swallow the rule. Without the concurrence requirement, non-primary coordinators could coordinate the previously exclusive channels with no oversight and the primary coordinators would have no way to protect incumbent utility, railroad, and automobile emergency service users.

ITA does not explain how any aspects of the rule's underlying policy or application have changed so dramatically so as to warrant a major modification. Instead, ITA merely discusses its qualifications to be a frequency coordinator and emphasizes the alleged benefits of competition. Those arguments, however, do nothing to establish that Section 90.35(b)(2) is ripe to be modified. ITA's qualifications are irrelevant to the continuing need for the rule, *i.e.*, the continuing need to have the most experienced and knowledgeable coordinator for each type of service protecting incumbent licensees.<sup>12</sup>

ITA's arguments concerning competition are similarly irrelevant. In the *Second Report and Order*, the Commission expressly stated that the need to protect the highly

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<sup>11</sup> ITA supported the first iteration of Section 90.35(b)(2), which lacked the concurrence option and, thus, would have prohibited ITA from coordinating the former Power, Railroad, and Automobile Emergency Radio Service channels at all.

<sup>12</sup> Also, ITA is already deemed qualified to coordinate the frequencies at issue so long as it obtains concurrence. *See* 47 C.F.R. § 90.35(b)(2).

sensitive communications at issue supercedes concerns with facilitating competition.<sup>13</sup> Also, all of ITA's arguments could have been made years ago through petitions for reconsideration or review of the orders promulgating Section 90.35(b)(2). Raising these arguments now, under the guise of a request for certification as a frequency coordinator, is tantamount to a collateral attack on the rule. At the least, it constitutes a woefully late petition for reconsideration.

Section 90.35(b)(2) remains necessary to protect power utilities' radio systems. In fact, the importance of maintaining the integrity of utilities' radio systems has increased in recent years in light of the nationwide push for emergency preparedness and homeland security. A report published by the National Telecommunications and Information Administration ("NTIA") in January 2002 cautioned that a disruption in a power generating station's control computer could be "just as devastating" to the Nation's economy as the September 11, 2001 terrorist attacks on the World Trade Center.<sup>14</sup> Additionally, pursuant to the Homeland Security Act of 2002, the Department of Homeland Security is responsible for developing a comprehensive national plan for securing the key resources and critical infrastructure of the United States, including power production, generation, and distribution systems.<sup>15</sup>

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<sup>13</sup> *Second Report and Order* at 14330. In any event, competition *does* exist, as non-primary coordinators are permitted to perform the work so long as they obtain concurrence.

<sup>14</sup> Marshall W. Ross and Jeng F. Mao, *Current and Future Spectrum Use by the Energy, Water, and Railroad Industries*, U.S. Department of Commerce, National Telecommunications and Information Administration at 3-3 (Jan. 30, 2002).

<sup>15</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, § 201(d) (2002).

Also, given the fact that ITA's experience is principally with non-utility licensees,<sup>16</sup> Westar is concerned that allowing it to coordinate applicants on the former Power Radio Service channels without the concurrence of UTC could lead to ITA placing many non-utility licensees on those channels without sufficient concern for protecting incumbent utilities.<sup>17</sup> Westar depends on UTC to carefully oversee coordination of utilities' previously exclusive frequencies and to block coordinations by non-primary coordinators that do not sufficiently protect their systems. Westar is additionally concerned with whether ITA has much interest in protecting utilities' radio systems, given the fact that it has recently taken positions hostile to utilities in several important rulemakings.<sup>18</sup>

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<sup>16</sup> One indication of this is that in 1986, prior to the Refarming Rulemaking, the Commission selected one coordinator (with certain exceptions) for each of the eighteen radio services. ITA (then known as the Special Industrial Radio Service Association, Inc.) did not even apply to coordinate the Power Radio Service. Rather, it applied and was chosen for the Special Industrial Radio Service. In the Matter of Frequency Coordination in the Private Land Mobile Radio Services, PR Docket No. 83-737, *Report and Order*, 103 FCC 2d 1093, 1132, 1135 (1986).

<sup>17</sup> ITA's experience in coordinating utilities on 800 and 900 MHz channels is largely irrelevant because ITA is constrained by fixed mileage separations mandated in the Commission's Rules. However, because of the "shared" nature of channels below 800 MHz, coordinators have considerable discretion in making frequency recommendations, and it is for this reason that the Commission has required UTC's concurrence for coordinations on the formerly exclusive Power Radio Service channels.

<sup>18</sup> See In the Matter of Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, Joint Reply Comments of ITA, Nextel Communications, et al. (filed Aug. 7, 2002) (in which ITA is advancing a rebanding plan that is uniformly opposed by utilities); In the Matter of the 4.9 GHz Band Transferred From Federal Government Use, WT Docket No. 00-32, Reply Comments of ITA (filed Aug. 7, 2002) (in which ITA recommends limiting access to the 4.9 GHz band to "public safety services," to the exclusion of utilities.)



### **III. ITA INCORRECTLY STATES THAT CERTAIN FREQUENCIES ARE STILL EXCLUSIVE TO UTILITIES, RAILROADS, AND AUTOMOBILE EMERGENCY SERVICES**

In a misguided attempt to assuage concerns that it will load the former Power, Railroad, and Automobile Emergency Radio Service channels with licensees outside of those subgroups, ITA states that those channels “should retain exclusive-use by their current eligibility groups.”<sup>19</sup> ITA contends that it “simply requests the authority to coordinate” applications for those users.<sup>20</sup> These statements are incorrect and indicate that ITA should not be permitted to coordinate these frequencies without UTC’s oversight.

ITA’s statement regarding the exclusivity of the former Power, Railroad, and Automobile Emergency Radio Service channels is incorrect because those channels were opened to all I/B eligibles in the Refarming Rulemaking.<sup>21</sup> ITA’s statement that it “simply requests the authority to coordinate” applications for utilities, railroads, and automobile emergency services is also incorrect because ITA already has authority to coordinate such applications.<sup>22</sup> It can even coordinate those services’ applications on the formerly exclusive frequencies so long as it obtains concurrence from the applicable primary coordinator.<sup>23</sup>

ITA’s misunderstandings in this area indicate that it should not be permitted to coordinate the formerly exclusive channels without UTC’s oversight. Giving it complete rein to coordinate I/B eligibles on those frequencies could lead to overly aggressive or

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<sup>19</sup> Informal Request for Certification of the Industrial Telecommunications Association, Inc., RM-10687, p. 9 (filed Jan. 27, 2003).

<sup>20</sup> *Id.*

<sup>21</sup> 47 C.F.R. 90.35 (2002); *Second Report and Order* at 14317-18.

<sup>22</sup> 47 C.F.R. 90.35(b)(2).

<sup>23</sup> 47 C.F.R. 90.35(b)(2).

otherwise imprudent coordinations and, hence cause the congestion and interference that Section 90.35(b)(2) was specifically intended to prevent.

#### **IV. CONCLUSION**

The Commission determined through the Refarming Rulemaking that the formerly exclusive Power, Railroad, and Automobile Emergency Radio Service frequencies are still heavily used by power utilities, railroads, and automobile emergency services and thus warrant special protection. It issued that protection in the form of Section 90.35(b)(2), which assigns oversight of those channels to FCC-designated primary coordinators. The need for preserving the integrity of radio systems operating on those channels remains strong, and ITA has not set forth any convincing arguments for modifying Section 90.35(b)(2) such that the primary coordinators' oversight should be eliminated. Therefore, ITA's petition for rulemaking must be denied.

WHEREFORE, THE PREMISES CONSIDERED, Westar respectfully requests that the Commission deny ITA's Informal Request.

Respectfully submitted,

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Dated: April 25, 2003

## **CERTIFICATE OF SERVICE**

I, Gloria Smith, do hereby certify that on this 25th day of April 2003, a copy of the foregoing "Opposition of Westar Energy, Inc." was mailed, via U.S. Mail, postage prepaid to each of the following:

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